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Supreme Court, U.S.
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No. 99-536

IN THE

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The Society for Human Resource Management ("SHRM"), the voice of human resource professionals for over 50 years, submits this brief in support of Respondent Sanderson Plumbing Products, Inc.[1] SHRM represents over 130,000 human resource professionals in the United States and in 80 other countries. SHRM leads, educates, and provides a forum for human resource professionals regarding matters of critical daily importance to managing employees in the workplace. Human resource professionals develop and administer structures to recruit, train, and manage employees in all types of work environments. SHRM and its members are deeply concerned with understanding and implementing all non-discrimination and equal opportunity laws and principles in the workplace. As this Court recognized last term in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), this prophylactic role in policing and preventing discrimination furthers the goals of Title VII, the Age Discrimination in Employment Act, and the Americans With Disabilities Act as much or more than litigation or damage awards. SHRM's members are typically the persons involved in implementing, administering and training on non-discrimination policies and in reviewing and implementing adverse employment decisions that are increasingly challenged in the courts.

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1. *Amicus* files this brief, pursuant to Supreme Court Rule 37.3, with the written consent of the parties. Evidence of said consent is filed concurrently with this brief. No person or entity other than *amicus curiae*, its members, or its counsel authored any portion of this brief or made any monetary contribution to the preparation or submission of this brief.

The issue before the Court — on the standard for granting judgment as a matter of law for employers in employment discrimination actions — is vital to SHRM because of its members' close involvement in preventing, resolving and defending employment discrimination litigation. Contrary to the implications of some of the briefs supporting the Petitioner, Petitioner and *amici* supporting Petitioner are not alone in contending that laws against discrimination are a vital part of our national fabric — but mistakes and misjudgments are not discrimination, and those cases, which involve everyday occurrences in imperfect workplaces, do not belong in front of juries. Petitioner and many *amici* supporting Petitioner urge an impractical position on where to draw the line in evaluating discrimination claims on a motion for judgment as a matter of law; they urge letting far more cases proceed to jury decisions even in the absence of actual evidence or inferences supporting unlawful discrimination. This position is untenable in light of the current realities of the workplace and developments in the practice of employment law.

SHRM members are faced with an unusual explosion of employment lawsuits, a curious development in an era of economic prosperity and labor shortage. A recent report by the United States Department of Justice confirms that between 1990 and 1998 employment discrimination cases brought in federal court have tripled.[2] Given this nation's

2. *See Civil Rights Complaints in U.S. District Courts, 1990-98,* Department of Justice Bureau of Justice Statistics (January 16, 2000). This does not reflect the many claims filed under parallel state anti-discrimination laws in state courts. Many state courts look to federal precedent in deciding these dases. In addition to litigated claims, according to figures recently released by the EEOC's Office of Research, Information and Planning, from 1992 through 1999 an average of 81,833 discrimination charges were filed each year. Daily Labor Report (BNA), January 31, 2000, at E1.

progress in combating bigotry, this exponential growth in employment claims cannot reflect a three-fold increase in discrimination or intolerance. Rather, it is an explosion of litigation. This historical reality compounds the impracticality and adverse impact of the position urged by Petitioner and his supporting *amici*.

SHRM appears in this action to stress the need for a standard faithful to both the Civil Rights laws and the need to combat workplace discrimination, as well as to advance the purpose of procedural rules relieving courts and employers from unnecessary trials. Such a standard would expeditiously dispose of cases which simply question the non-discriminatory judgment of management, or even the incomplete explanations sometimes offered to spare employees (and employers) from embarrassment. It would protect the legitimate — albeit sometimes imperfect but non-discriminatory — judgment calls made by management day to day. As a forum for excellence in the field of human resource management, SHRM does not defend the practice of offering false explanations for employment decisions, or making sloppy and incorrect decisions. It simply recognizes that both practices, while problematic in other respects, are not unlawful and should not subject SHRM members, or the organizations employing them, to protracted court proceedings.

SUMMARY OF ARGUMENT

Neither the "pretext-only" nor the pure "pretext-plus" approach to this Court's proof-scheme in employment discrimination cases provides a satisfactory rule for every case. No such rigid semantic formula can properly take into account the variety of circumstances that exist in the real world of the workplace. A more flexible middle ground is

needed. Such an approach would better serve to allow employers, agencies and courts to screen out frivolous cases, in keeping with the purposes of Fed. R. Civ. P. 50, 56, and other Rules of Civil Procedure, while also deterring and correcting true discrimination, thereby advancing the aims of the Civil Rights Acts.

A strict "pretext only" rule, for example, would improperly allow juries to second-guess employers' business judgments. Such a rule would also permit juries to consider cases in which an employer gives an employee a "wrong" reason for a disciplinary action simply to avoid personal embarrassment, even though the real reason (e.g., poor skills, abrasive temperament) is indisputably non-discriminatory. On the other hand, requiring plaintiffs to prove "pretext plus" in every case would overlook instances in which an employer giving a false reason for an action does so in circumstances evincing mendacity (as opposed to a mistake or faulty business judgment) on the part of the decision-maker, or an improper motive from which discriminatory animus may be reasonably inferred.

A proper "Whole Case Rule" would be stated thus: A plaintiff claiming employment discrimination can prove pretext sufficient to withstand judgment as a matter of law by showing that, taking into account the entire record, there is significantly probative evidence to allow a rational trier of fact to infer that the employer acted with discriminatory intent. Such a showing may be made by direct or circumstantial evidence, but the plaintiff cannot rely on mere speculation or conjecture as to the employer's motives, or on the plaintiff's own subjective opinion regarding the employer's business judgment. In some cases, as where the employee's *prima facie* case is strong, and employer

mendacity may reasonably be inferred, it may suffice for the plaintiff simply to demonstrate that the employer gave a deliberately false reason for its action. In other cases, as where evidence indicates innocent (non-discriminatory) motive, the plaintiff cannot escape judgment as a matter of law solely by showing that the employer gave the "wrong" reason for its action.

The question on summary judgment is whether the record, taken *as a whole* ("pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any"), shows "that there is no *genuine* issue as to any *material* fact" and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (emphasis added); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[3] This requires that federal district judges consider the entire factual context in which employment decisions are made, rather than artificially focusing on one particular word or fact in the record. Given their typical wealth of experience in law and life, federal trial judges are well equipped to perform this all-important gatekeeping function. Moreover, as a further objective check, appellate courts exercise *de novo* review of such decisions. *See* n.3.

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3. As this Court has recognized, essentially the same standards apply to a judgment as a matter of law in jury trials under Rule 50, which authorizes the district court to remove a case from a jury where, after a party has been fully heard on an issue, "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252 (1985). The appellate court reviews a decision on a Rule 50 motion under the same standard. *Flippin v. O'Dea*, Case No. 98-6303, 1999 U.S. App. LEXIS 34062 (6th Cir., December 16, 1999) at *2; *Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 336 (5th Cir. 1999); *Criado v. IBM Corp.*, 145 F.3d 437, 441 (1st Cir. 1998); *Cross v. Cleaver*, 142 F.3d 1059, 1066 (8th Cir. 1998).

Under this approach, no employee with a case substantial enough to go to a jury need worry about a premature disposition of his or her case. Nor should employers be concerned that a large number of frivolous cases will be tried. Moreover, in terms of compliance and deterrence (far more beneficial than after-the-fact compensation and punishment following expensive and time-consuming litigation of individual cases), employees and employers alike would enjoy the greater predictability that accompanies the application of common sense to workplace situations. On the one hand, no employee would be allowed to assume or speculate that membership in a protected class automatically immunizes one from disciplinary action for poor job performance or the ordinary travails of an imperfect workplace. An employee would not be able to rely solely on a simple mantra — "the employer lied" — to conclude that one sin proves all sins. On the other, no employer would be permitted to pursue discriminatory practices with impunity simply by inventing non-discriminatory reasons for an adverse employment action. An employer could not invoke its own mantra — "it was a business judgment" — to disguise true discrimination.

ARGUMENT

I. Neither Erroneous Business Judgment Nor False Excuses Designed to Avoid Embarrassment Are Pretexts for Discrimination Justifying Denial of Judgment as a Matter of Law.

Nearly every federal Circuit Court of Appeals has expressly upheld the long-standing notion that the courts should not act as "super-personnel departments," reexamining the prudence of employers' business judgments.[4] Indeed, as the First Circuit Court of Appeals stated two decades ago in an ADEA case:

> While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and non-discriminatory,

4. *See, e.g., Hidalgo. v. Overseas Condado Ins. Agencies, Inc.*, 120 F.3d 328, 337 (1st Cir. 1997); *Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997); *DeJarnette v. Corning Incorporated*, 133 F.3d 293, 299 (4th Cir. 1998); *Scott v. University of Mississippi*, 148 F.3d 493, 509 (5th Cir. 1998), *questioned on other grounds, Kimel v. Florida Bd. of Regents*, __ U.S. __, 120 S. Ct. 631 (2000); *Baron v. City of Highland Park*, 195 F.3d 333, 341 (7th Cir. 1999); *Regel v. K-Mart Corp.*, 190 F.3d 876, 880 (8th Cir. 1999); *Simms v. Oklahoma ex rel. Dept. of Mental Health & Substance Abuse Services*, 165 F.3d 1321, 1330 (10th Cir.), *cert. denied*, __ U.S. __, 120 S. Ct. 53 (1999); *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355 (11th Cir. 1999); *Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999). As these courts stress, the issue is not whether the employer's decisions is "right" or even rational, but only whether it is discriminatory.

> but does not have to be a reason that a judge or jurors would act on or approve. Nor is an employer required to adopt a policy that will maximize the number of minorities; women or older persons in his work force. An employer is entitled to make his own policy in business judgments and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination.

Loeb v. Textron, Inc., 600 F.2d 1003, 1013 n.6 (1st Cir. 1979).

This "business judgment rule" is entirely in accord with this Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993):

> We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact finder determines, according to proper procedures, that the employer has unlawfully discriminated.

Id. at 514.

The Court further emphasized the point:

> [N]othing in law would permit us to substitute for the required finding that an employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Id. at 514-515.

Thus, the business judgment rule, combined with this Court's opinion in *Hicks*, clearly demonstrates that neither erroneous business judgment nor false excuses designed to avoid embarrassment are pretexts for discrimination justifying denial of judgment as a matter of law.

For example, suppose an employer is faced with the economic necessity of laying off three out of six accountants. Suppose also that in the exercise of its legitimate business judgment, the employer lays off the three that it genuinely believes are the least valuable to its organization. Further assume that one of the three laid off sues for race discrimination. Perhaps she can even prove unequivocally that the quality of accounting work in the employer's business dropped dramatically as a result of her discharge. Should the employer be required to face a jury on the ex-employee's discrimination claim simply because, in hindsight, its business judgment was incorrect? Certainly not. That is exactly the type situation for which the business judgment rule was adopted. The employer should not have to face a jury, often not attuned to the nuances of employment decisions, simply because the employer made a mistake that had no underlying discriminatory motive, or because the employer strayed (in a non-discriminatory manner) from "best practices" in human resources.

With respect to false excuses designed to avoid embarrassment, consider the following situation. Numerous employees complain to their employer that a particular new employee has an abrasive and offensive personal manner — or even offensive personal hygiene habits. The employees tell the employer they do not wish to work with that employee for that reason. The employer has also noticed the employee's problems and knows, too, that the employee is not a stellar

performer. The employer decides that the appropriate course of action to promote harmony and efficiency in the workplace is to discharge the employee. Understandably embarrassed to cite personal mannerisms as the reason for discharge, the employer chooses the immediate path of least resistance (out of laziness, convenience, or even fear of confrontation) and tells the employee that his position is being eliminated.

Clearly, although the employer has given the employee a false reason for his discharge, discrimination was not the real reason.[5] Pursuant to *Hicks*, a court should not substitute the finding that the employer's reason was false for the required finding that discrimination was the reason. Such a case should not be sent to the jury.

In the instant case Petitioner clearly questions the adequacy of Sanderson's business judgment (*see* Petitioner's brief at 10, 12, 28), and argues that judgment questions should go to a jury. *Amici* supporting Petitioner make similar arguments. They try to impose a *de facto* code of extra-careful treatment and scrutiny of employment decisions for everyone in a protected class. Yet virtually all applicants and employees adversely affected by an employment decision feel that they have been misjudged. Not all their claims should proceed to trial.

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5. As the EEOC itself concedes, "The true nondiscriminatory motive need not be an illegal one. An employer might withhold its true motive not because it is unlawful but because it is embarrassing, such as nepotism or personal animosity, or in order to spare the employee's feelings." Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 22, n.5. This observation precisely illustrates the need for the kind of flexible rule SHRM proposes here.

II. This Court Can Adopt a Flexible Test Allowing Cases With Sufficient Evidence of Discrimination to Proceed to the Jury, While Culling Unsupported Claims.

Petitioner and many *amici* supporting Petitioner urge a rigid test in which every case casting doubt on the reliability of the employer's proffered reasons should proceed to trial. This test punishes the innocent, divests courts of their proper gatekeeping function, and diverts attention from meritorious cases involving actual discrimination. Judgment as a matter of law favoring the employer, as argued above, is appropriate in cases involving: (1) adherence to even erroneous business judgment; and (2) certain knowingly false or incomplete reasons underlying the employer's action — reasons provided to conceal or sugarcoat an embarrassing but not discriminatory real reason.

In each of these categories, there is no evidence of intentional discrimination. Anti-discrimination laws do "not make employers liable for doing stupid or even wicked things; it makes them liable for *discriminating*." *Norton v. Sam's Club*, 145 F.3d 114, 119-20 (2d Cir.), *cert. denied*, 525 U.S. 1001 (1998) (emphasis in original). Further, as this Court emphasized in *Hicks*, even lying under oath does not constitute proof of a discriminatory motive: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." *Hicks*, 509 U.S. at 521.

On the other hand, in some cases, this Court has held that evidence justifying disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination and allow a case to proceed to a jury.

See Hicks at 511. Following *Hicks*, this Court can now illuminate a reasoned middle ground averting trials for claims with insufficient evidence of discrimination, while drawing appropriate inferences from unexplained mendacity *or* other evidence indicating discriminatory animus by the decision-makers and allowing those cases to proceed to trial.

Employers' unexplained or palpable mendacity, in contrast with a simply mistaken reason or exercise of faulty business judgment, may, as *amicus* Equal Employment Opportunity Commission suggests, permit an inference of a wrongful motive. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 18-19. *See also Aka v. Washington Hospital Center*, 156 F.3d 1284, 1298 (D.C. Cir. 1998). On the other hand, a pure "pretext only" approach to denying judgment as a matter of law, as urged by Petitioner and his supporting *amici*, reflects neither the spirit of *Hicks* nor the realities of the imperfect workplace.

The District of Columbia Circuit staked out an appropriate middle ground interpretation of *Hicks* in its *en banc* consideration of *Aka v. Washington Hospital Center*, *supra*. *Aka* rejected the "pretext-only" (even non-discriminatory pretext) rule urged by Petitioner and several *amici* in support of Petitioner, but also did not embrace a stringent test requiring discrimination plaintiffs in every case to come forward with the often elusive direct evidence of discrimination. The majority opinion in *Aka* even shied away from using the term "pretext" at all, explaining:

> The term "pretext" can be slippery; sometimes it means that an employer's explanation is incorrect, and sometimes it means both that the explanation is incorrect and that the employer's real reason was discriminatory. . . . We will avoid using the term "pretext," and instead refer (as appropriate) to evidence that the employer's explanation is false, that it is a lie, or that the employer's real motivation was discriminatory.

Id. at 1288, n.3.

Aka holds the plaintiff to the burden of showing, as *Hicks* requires, that the employer's reason is false and that the real motivation was discrimination. That court acknowledged that "there are at least some situations in which genuine issues of material fact as to the falsity of the employer's explanation will not suffice alone to avoid summary judgment." *Aka*, 156 F.3d at 1290. Examples of this principle, the court explained, include falsehoods made (with no evidence suggesting otherwise) to conceal other embarrassing reasons[6] and instances of weak showings of pretext combined with a weak *prima facie* case. *Id.* at 1291. Yet, *Aka* also holds that a plaintiff *can* escape judgment as a matter of law by combining plain pretext with

6. An "innocent" excuse for a false explanation should not always guarantee judgment as a matter of law for an employer, but when there is no evidence to refute the sincerity or innocence of the excuse, summary judgment is appropriate. *See Aka*, 156 F.3d at 1291; *but see Aka*, 156 F.3d at 1294, n.8. A plaintiff's mere conclusions, suspicions or speculation on discriminatory motives clearly will not suffice to withstand summary judgment in this or any other instance. *See, e.g., Murphy v. ITT Educational Services, Inc.*, 176 F.3d 934, 938 (7th Cir. 1999); *Doan v. Seagate Technology, Inc.*, 82 F.3d 974, 977 (10th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997); *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1318 (4th Cir. 1993); *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1417-1418 (10th Cir. 1993); *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

the overall strength of the plaintiff's *prima facie* case *or* other evidence probative of discrimination by the decision-maker. The court explained that:

> the focus [for judgment as a matter of law] will be on whether the jury could infer discrimination from the combination of (1) the plaintiff's *prima facie* case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer) or any contrary evidence that may be available to the employer (such as evidence of a strong track record in equal opportunity employment).

Id. at 1289.[7]

In this regard, the *Aka* court advocates considering the case as a whole. *Id.* at 1290, 1291.[8] Although the plaintiff's

7. *See also Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996) ("the second part of this [*Hicks*] test sometimes may be satisfied without additional evidence where the overall strength of the *prima facie* case and the evidence of pretext suffice[s] to show intentional discrimination").

8. *See also* R. Acosta, R. and E. Von Vorys, *Bursting Bubbles and Burdens of Proof: Disagreements on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 Tex. Rev. Law & Pol. 207 (Spring 1998); Alice Marie Pettigrew, *Aka v. Washington Hospital Center: The District of Columbia Circuit Seeks Middle Ground in the Pretext-Only/Pretext Plus Debate*, 29 University of Memphis Law Review 863 (Spring/ Summer 1999).

true "discrediting of an employer's stated reason for its employment decision is entitled to considerable weight,"[9] it also "is not enough to disbelieve the employer." *Id.* For example, "there may be no legitimate jury question as to discrimination in a case in which a plaintiff has created only a weak issue of material fact as to whether the employer's explanation is untrue, and there is abundant independent evidence in the record that no discrimination has occurred." *Id.*

Perhaps the best example of this instance is the "business judgment" scenario discussed, *supra*. Even if one could disagree with the employer's assessment of matters such as qualifications, job performance, or appropriate behavior, the "judgment call" should not form the basis for a "discrediting of the employer's reasons" sufficient to escape summary judgment in favor of the employer. *Id.* at 1294. This reasoning also prevents plaintiffs from relying on their own self-serving self-assessments in order to evade summary judgment. *See DeJarnette v. Corning Incorporated*, 133 F.3d 293, 299 (4th Cir. 1998) (" 'it is the perception of the decision maker which is relevant,' not the self-assessment of the plaintiff"); *citing Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996).

Similarly, "[a]n employer's reliance on the disputed subjective assessments [*i.e.*, attitude or enthusiasm] will not create a jury issue in every employment discrimination case." *Aka*, 156 F.3d at 1298. To keep this "business judgment" defense "honest," however, the *Aka* court added a more objective component:

9. This is particularly true, the court in *Aka* explained, when the employer's explanation is "not only a mistaken one in terms of the facts, but a lie . . ." *Id.* at 1293.

> If a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate — something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.

Id. at 1294.

This approach works only if courts resist second-guessing management decisions or entering the role of a "super-personnel department," discussed *supra*. It protects reasoned, yet incorrect or assailable "business judgment," but prevents defendants from forever hiding under the cloak of business judgment when it is obvious that no reasonable person could have arrived at the same "judgment."

The other extreme is the instance in which "the employer's explanation is not only a mistaken one in terms of the facts, but a lie. . . ." *Id.* at 1293. In this instance, "[t]he jury can conclude that an employer who fabricates a false explanation has something to hide; that 'something' may well be discriminatory intent." *Id.* (citations omitted). Even a lie, however, does not automatically entitle the *plaintiff* to judgment as a matter of law. *Id.*

The moderate approach in *Aka*, if kept from extending to either a rigid "pretext only" rule or a strict "pretext plus" rule always requiring additional and direct evidence of discrimination, will spare the federal courts and employers from trying claims with insufficient evidence of

discrimination, while also protecting those whom Congress intended to protect under both the Civil Rights Laws and the Federal Rules of Civil Procedure.

III. Judgment as a Matter of Law is a Vital Tool to Protect the Interests of Courts and All Parties to Discrimination Lawsuits.

Since this Court's ruling in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), it has been clear that the trial judge plays the vital role of a gatekeeper in jury trials.

> . . . [B]efore evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed.

Id. at 250-51 (citations omitted) (emphasis in original).

This appeal presents the Court with an opportunity to provide further instruction to the trial court on its role as a gatekeeper in employment discrimination litigation. Such instruction is clearly appropriate given the divergence in understanding of this Court's earlier discussion of this role in *Hicks, supra,* and the growing questions over the continued vitality (and utility) of the *McDonnell Douglas/Burdine* framework in employment discrimination cases.[10]

10. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In light of the Court's decision in *Hicks, supra,* many commentators contend that the McDonnell Douglas/Burdine equation has served its purpose. *See, e.g.*, Henry L. Chambers, *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 Alb. L. Rev. 1 (1996); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995).

As documented above, there has been an explosion in employment discrimination litigation. To some measure, that explosion must be attributed to the recent availability of jury trials in such litigation.[11] Yet, individuals' rights to a jury trial are not rigidly dictated.[12] Courts have long recognized the need for jury control devices.[13] Employment discrimination litigation presents significantly unique challenges to jurors because of natural human empathy for individuals affected by adverse employment actions, whether or not those actions are motivated by unlawful discrimination. Discrimination is not the cause of all unjustified actions against members of protected classes (into at least one of which categories the majority of Americans fit, even excluding reverse discrimination claims). Mistakes and misjudgments are not unlawful discrimination. Those cases, involving everyday occurrences in imperfect workplaces do not belong in front of juries. Human issues, as well as the life experiences of the jurors, may often unwittingly transform employment discrimination litigation

11. Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, codified at 42 U.S.C. § 1981a(c), amended the Civil Rights Act of 1964 to allow jury trials in Title VII litigation if the plaintiff seeks damages.

12. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 289 (1966) (arguing that the Seventh Amendment did not codify "a rigid form of jury practice" in civil cases).

13. "There are a number of procedural devices used to restrict the power of the civil jury, which this Court has approved. Among these procedural devices are summary judgment, the directed verdict, special questions to the jury, and judgment notwithstanding the verdict." Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 483-84 (1996).

into "just cause" litigation if trial courts do not appropriately moderate such cases.[14] *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) (recognizing trial court's gatekeeper role also in deciding whether expert scientific evidence is sufficiently trustworthy to submit to a jury).

The complexity of the federal anti-discrimination laws further complicates the jury's work. Federal Rules of Civil Procedure 50 and 56 provide the trial court with several means to keep employment discrimination case from the jury when appropriate. Petitioner and many *amici* supporting Petitioner urge an impractical position on where to draw the line in evaluating discrimination claims on motions for summary judgment and for judgment as a matter of law. They urge letting legions of cases proceed to jury decisions even in the absence of actual evidence or of reasonable inferences supporting unlawful discrimination. This position is untenable in light of the current realities of the workplace and developments in the practice of employment law.

There can be no denying that adversely affected employees often truly believe that they have been the victims of unlawful discrimination or some unidentified "injustice." Those beliefs standing alone, however, do not always present jury questions. In order to proceed, the non-moving party must also show more than the existence of a "metaphysical doubt" regarding the material facts. *Matshushita Electric*

14. "Because of this trend toward more complex and obscurely-written jury instructions, the jury is unable to exercise its role in applying the law to the facts in the case, because it is unable to understand the legal principles that it is charged with applying." Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 387 (1996).

Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). *See also Anderson, supra*, 477 U.S. at 249-50.

In the appropriate case, the trial court may control the jury through the directed verdict provided for in Federal Rule of Civil Procedure 50. This Court long ago upheld the constitutionality of the directed verdict in the context of civil jury trials as not unconstitutionally abridging the fact-finding power of juries.[15] Rule 50(b) authorizes a "judgment as to a matter of law," made by the judge after the jury has returned its verdict. Again, this Court long ago approved the constitutionality of this device.[16]

Under the same standard, in the appropriate case, the trial court may control the case through summary judgment

15. *Galloway v. United States*, 319 U.S. 372, 395-96 (1943); *see also Hepner v. United States*, 213 U.S. 103, 115 (1909) (noting that the right to civil jury trial under the Seventh Amendment is "subject to the condition fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law"); *Commissioners of Marion County v. Clark*, 94 U.S. 278, 284 (1877) (a judge is allowed to question, before evidence is left to the jury, whether there is any evidence "upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed"); *Parks v. Ross*, 52 U.S (11 How.) 362, 373 (1850) ("a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it").

16. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 660 (1935) (the practice of taking jury verdicts subject to a ruling on questions of law "was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury").

provided for in Federal Rule of Civil Procedure 56. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact that that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The same evidentiary standard applies to Rule 50 and Rule 56 analyses. *Anderson, supra*, 477 U.S. at 250-52.

Not every *prima facie* employment case presents a jury question. At every stage of the litigation, the trial court must keep in play evidentiary standards that determine whether the matter should as a matter of law proceed to the next stage. ". . . [T]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages." *Anderson, supra*, 477 U.S. at 255. At every stage, therefore, the trial court must determine whether or not there is sufficient evidence as a matter of law to support a finding of unlawful discrimination.

> We are not, however, entitled to give a party the benefit of unreasonable inferences, or those at war with the undisputed facts. A mere scintilla of evidence is inadequate to support a verdict, and a judgment as a matter of law is proper when the record contains no proof beyond speculation to support the verdict.

Larson v. Miller, 76 F.3d 1446, 1452 (8th Cir. 1996) (en banc) (citations and quotation marks omitted).

Legal realists have noted that distinction between issues of fact and issues of law is a tenuous one at best.[17] In reality, the trial court is in the best position to apply the distinction between law and fact in the context of an employment discrimination case over which it has presided. Rule 50, as amended, recognizes this.[18] Rule 56, as explained by this Court in *Anderson*, recognizes this as well.

Petitioner and *amici* supporting Petitioner argue that the court "substituted its view of the weight of the evidence for the jury's reasonable view." Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 24; Petitioner's Brief at 19. Judgment as a matter of law is not appropriate if "reasonable minds could differ as to the import of the evidence." *Anderson, supra,* 477 U.S. at 250. This is simply not what the court did in this case, however. The court correctly considered whether or not the evidence was sufficient to meet the quantum of proof required in this case. As Justice Brennan observed in *Anderson, supra,* under the majority's

17. Bruce E. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* 73 (1987) ("The hoary distinction between fact and law is, at bottom, artificial, although often invoked."); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1181 (1989) (arguing that reasonable care is a question of fact when "legal rules have been exhausted and have yielded no answer"); Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 Yale L. J. 667, 668 n.4 (1949).

18. Under Rule 50, the standard for granting a motion for judgment as a matter of law is the same whether the trial court addresses the motion before or after the case is submitted to a jury. *See* subdivision a under Advisory Committee Notes, 1991 amendment. *See also Larson v. Miller*, 76 F.3d 1446, 1452 n.3 (8th Cir. 1996) (en banc).

holding, this is what judges must do. The judge must bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum". 477 U.S. at 266-67, Brennan, J. dissenting. This is entirely different from weighing the evidence. It is instead determining whether or not there is sufficient evidence to allow the jury to weigh, considering the case as a whole. The role of the trial court in employment discrimination litigation is not to permit speculation, surmise and conjecture to create a jury issue. Rules 50 and 56 provide the trial court with the proper means to accomplish this.

Petitioner's *amici* essentially acknowledge that much of employment discrimination litigation is a fishing expedition:

> In most employment discrimination cases, the plaintiffs cannot file suit already in possession of the facts with which they can prove the merit of their claims. Usually, only the employer knows the true basis for its actions. Because of the press of numerous charges of discrimination and inadequate funding, the investigation of such charges by government agencies is often superficial, leaving the charging party with few additional facts. In addition, pre-complaint investigations by counsel are often necessarily incomplete, because State ethics rules frequently bar plaintiffs' counsel from interviewing the decisionmakers. Thus, plaintiffs are ordinarily dependent on discovery to learn the defendant's reasons for the challenged action, to discover whether there are reasonably comparable employees of a different race or gender or age who were treated more favorably, to determine

> whether there are factors that affect their comparability or explain the differences in treatment, to explore the basis of each nondiscriminatory reason the defendant will proffer, and to look for evidence to rebut those reasons.

Brief of Amici Curiae Lawyers' Committee for Civil Rights Under Law, *et al.* at pages 24-25 (footnote omitted).

This argument presumes that if permitted to look long enough, any plaintiff (or her counsel) will eventually find some evidence somewhere to support an argument to the jury that the employer's proffered reason for an adverse employment action was either obtuse or incorrect. This view of this evidence would thereupon confirm the plaintiff's subjective belief held at the commencement of the litigation that she was, indeed, the victim of unlawful discrimination. At the end of the day, however, that evidence may not be sufficient to present a real jury question. The true candor of the argument of *amici* is that subjective beliefs are what propel much of the anti-discrimination litigation; the subjective belief that somewhere out there is some evidence that will cast doubt on the employer's proffered reason thereby after the fact justifying the litigation.

"In law, as elsewhere, actions and evidence acquire their meaning from experience and context." Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279, 305 (November, 1997). Trial courts must moderate the experiences and contexts of the opposing parties in order for consistently applied rules to emerge in employment discrimination litigation. Unfortunately, at times sloppy and incorrect decisions occur

in the employment context. Employers offer false explanations for employment decisions for any number of lawful reasons. *See* Section I, *supra*. While such actions may be problematic from a human resource management viewpoint and even poor business practices, they do not violate federal law. SHRM members, and the organizations employing them, should not be subjected to protracted court proceedings as a result of lapses in business judgment. Lapses in business judgment do not, per se, create jury questions.

CONCLUSION

The Court should resolve the inconsistencies in the courts below and the unworkable solution urged by Petitioner and his supporting *amici* by articulating a clear, simple "Whole Case Rule." This case provides an excellent example of a situation where, applying such a rule, the Fifth Circuit's judgment as a matter of law for the employer should be affirmed. This principled, common-sense approach will spare federal courts and employers from trying claims supported by no evidence of discrimination, advancing the aims of the Federal Rules of Civil Procedure while also protecting those whom Congress intended to protect under the Civil Rights Laws.

Respectfully submitted,

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